Office of the Attorney-General

Cabinet Committee on Treaty of Waitangi Negotiations

REVIEW OF FORESHORE AND SEABED ACT 2004: OPTIONS FOR GOVERNMENT RESPONSE TO *PĀKIA KI UTA, PĀKIA KI TAI* AND NEXT STEPS

Proposal

1 This paper reports on the findings in the Ministerial Review Panel's report *Pākia ki uta, pākia ki tai* on the Foreshore and Seabed Act 2004. This paper also outlines the next steps to develop the Government response to the Panel's report and the Government's wider review of the Act.

Executive summary

2 In accordance with the Relationship and Confidence and Supply Agreement between the National Party and the Māori Party, I instigated a review of the Foreshore and Seabed Act 2004 (the Act).

3 In February I established a Ministerial Review Panel (the Panel) to conduct the review and to provide me with advice on proposals for the Act. The Panel's involvement in the review ran for four months from 1 March to 30 June 2009.

4 On Tuesday 30 June 2009, in accordance with its Terms of Reference, the Panel provided me with its report, *Pākia ki uta, pākia ki tai*: Report of the Ministerial Review Panel on the Foreshore and Seabed Act 2004. The report was publicly released on Wednesday 1 July 2009.

5 The report addresses the four questions posed in the Terms of Reference. The key conclusion from the Panel's report was that the Act should be repealed and the process of balancing Māori property rights with public rights and public expectations in the foreshore and seabed must be started again.

6 Overall, the Panel's report provides information, models and ideas that can assist in informing the Government's initial response to a review of the Act. My preliminary view is that a repeal of the Act has a symbolic value that will assist in resolving criticisms associated with the passage of the Act. However, I am of the view that it is important that Government takes its time in responding to the Ministerial Panel's report and in progressing the Government's wider review of the Act. In the next month, I will continue to carefully consider the report so that I can develop a comprehensive resolution to this issue that can stand the test of time. I will report back to Cabinet by the end of August with further detailed options to consider.

Background

7 The Relationship and Confidence and Supply Agreement between the National Party and the Māori Party stated (amongst other things) the following:

> *The National Party and the Māori Party will, in this term of Parliament, initiate as a priority a review of the application of the Foreshore and Seabed Act 2004 to ascertain whether it adequately maintains and enhances mana whenua.*
>
> *Ministers representing the two parties will work together to prepare agreed terms of reference for the review by 28 February. The review will be completed by 31 December 2009.*

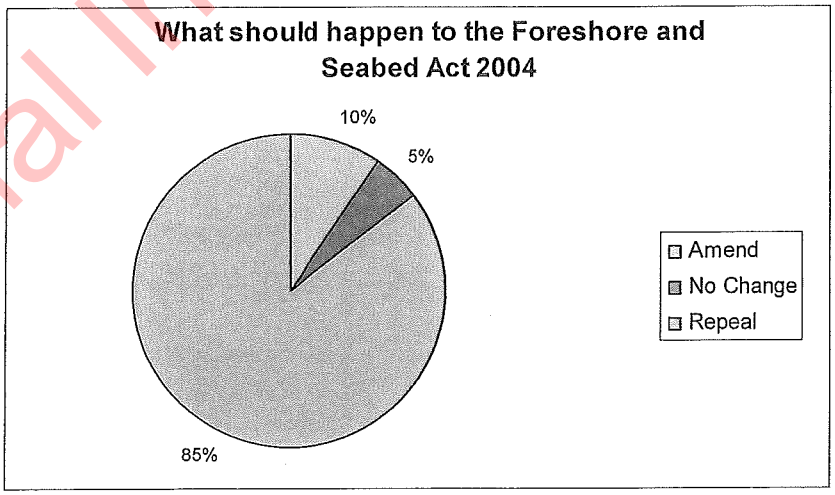
8 On 23 February 2009 Cabinet agreed the Terms of Reference for the Panel [CAB (09) 6/3B) refers].

9 On Tuesday 30 June 2009, in accordance with its Terms of Reference, the Panel provided me with its report, entitled *Pākia ki uta, pākia ki tai: Report of the Ministerial Review Panel on the Foreshore and Seabed Act 2004.* It was publicly released on Wednesday 1 July 2009.

10 On Monday 6 July 2009, the Cabinet considered a high-level summary of the Panel's report [CAB Min (09) 24/20 refers].

Summary of the Panel's Report

11 The Report includes a significant amount of background material. It provides an overview of the consultation process that the Panel employed. In summary, the consultation process included 21 public meetings across the country and the receipt of 580 submissions (written and oral). 359 of the submissions expressed a view on what should happen to the Act.



12 Of the 359 submitters, 85 percent wanted the Act repealed, and of these, almost 2/3 (222) indicated that the Act should be repealed and replaced

with something new. 83 of the 359 submissions (23 per cent) submitted that the Act should be wholly repealed and the status quo after the Ngāti Apa decision in 2003 reverted to.

13 The Panel stressed that there were few submissions and little debate on what should be done if the Act was repealed – the focus was on establishing that the Act should be repealed. The Panel said that their options should not be progressed without further input from Māori and other interested groups.

14 The Terms of Reference posed four questions for the Panel to respond to:

Question 1 *What were the nature and extent of the mana whenua and public interests in the coastal marine area before the Ngāti Apa case?*

Question 2 *What options were available to the government to respond to the Ngati Apa case?*

Question 3 *Whether the Foreshore and Seabed Act effectively recognises and provides for customary or Aboriginal Title and public interests (including Māori, local government and business) in the coastal marine area and maintains and allows for the enhancement of mana whenua?*

Question 4 *What, in outline, are the options on the most workable and efficient methods by which both customary and public interests in the coastal marine area can be recognised and provided for; and in particular, how can processes of recognising and providing for such interests be streamlined?*

15 The following section provides an overview of the Panel's advice on the questions posed in the Terms of Reference. I note that aspects of the Panel's advice and suggestions could be disputed or the concepts they have raised have been contested in the past. For example, the Panel presumes that the foreshore and seabed is covered by title rather than by rights. This assumption may have implications for any replacement regime.

Question 1 – on prior interests in the coast

16 The Panel advised that:

a Prior to the *Ngāti Apa* case, the whole of the coastal marine area to the outer limits of the territorial sea, or to such outer limits as customarily controlled, was subject to the Native or Aboriginal or customary title; unless it could be shown that the Native or Aboriginal or customary title to any specified part had been clearly and plainly extinguished.

b However, there remains an open question of whether the customary interests should be treated as amounting to exclusive ownership rights in the foreshore and seabed.

c The legal rights of the general public in the coastal marine area were confined to the rights of navigation and fishery.

17 Further, the Panel found that non-legal customary and public interests in the popular sense were respectively:

a The maintenance of customary usages, management and control to provide for personal sustenance, tribal culture, identity and autonomy and respect for and the health of the natural order; and

b Maintaining the coastal marine area as a natural environment that is a public recreation ground, the birthright of every New Zealander – that there is free access for all.

Question 2 – on the options that could have been pursued

18 The Panel identified the following options could have been pursed by the former government:

a To appeal the decision to the Privy Council;

b To do nothing, leaving the courts to decide;

c To amend the statute based Māori land law (If the concern was that the foreshore and seabed could be sold if it was converted to Māori land in individual ownership,);

d To include foreshore and seabed settlements in Treaty settlements, revisiting those settlements already completed;

e To negotiate a nationwide settlement with hapū and iwi (following the precedents set by the Māori fisheries and aquaculture settlements).; and

f To substitute a special statute to govern customary and public interests in the coastal marine area (the option that was chosen in 2004).

19 The Panel noted that the majority of submitters through the consultation process also seek a legislated outcome "provided that the outcome is fair and principled, that is plainly what most people prefer".

Question 3: the legal integrity of the Act

20 The Panel stated that the Act did not effectively recognise and provide for customary or Aboriginal Title. Broadly the reasons are that:

a The Act removed the legal rights of Māori to have the nature and extent of their customary or Aboriginal Title interests determined by the Courts in accordance with established principles of New Zealand law.

b Instead the Act imposed restrictive criteria on the tests for territorial customary rights that have no application to New Zealand jurisprudence and which penalise hapū and iwi who suffered extensive land loss.

c The Act severely reduced the nature and extent of customary rights according to New Zealand common law.

21 The Panel also stated that:

a The Act did not effectively recognise and provide for aboriginal title and public interests because it failed to balance those interests properly. More particularly, general public interests were advanced at the considerable expense of Māori interests.

b The Act failed to enhance the status of mana whenua because it reduces customary rights and it does not directly acknowledge the respective elements of customary use, customary management and customary control.

Question 4: on moving forward

22 Having reached the conclusion that change is needed, the Panel noted that it does not favour the status quo as a model, and that its four models for moving forward are premised on the repeal of the Foreshore and Seabed Act as a starting point. The four models are:

a Model 1: The "judicial" model;

b Model 2: The "staged settlement" model;

c Model 3: The "national settlement" model; and

d Model 4: The "mixed" model.

JUDICIAL MODEL

23 This model consists of returning to the situation immediately after the Ngāti Apa decision. The Panel considered that no one should be denied the opportunity to have their full customary rights determined by a legal process. This model would mean, in effect, that the Māori Land Court and the High Court could to hear cases. The Panel noted that this model has the advantage of comparative simplicity. However, the Panel did not favour this model as it is likely to be protracted, laborious and expensive and *"could result in an unmanageable patchwork of litigation"*.

STAGED SETTLEMENT MODEL

24 This model involves negotiations between hapū and iwi and the Crown, as part of the settlement of historical Treaty claims or, as at present, independent of that process. The Panel noted that while this process could be streamlined, negotiations have been slow and expensive.

NATIONAL SETTLEMENT MODEL

25 This model provides for a nationwide settlement of foreshore and seabed issues, similar to the existing fisheries or aquaculture settlement models, by which affected hapū or iwi may share in income accruing from the bed of the sea and foreshore. The Panel noted however that such an approach may not address foreshore and seabed management at the local level.

MIXED MODEL

26 The favoured option from the Panel includes elements of the staged settlement and national settlement models. As its starting point, the Panel suggests that an "interim" piece of legislation be passed that would do the following:

a Repeal the Act;

b Recognise and provide for the following principles:

i entitled hapū and iwi have customary rights in the coastal marine area;

ii the general public have rights of use and enjoyment of the coastal marine area;

iii both rights must be respected and provided for;

iv both rights must be limited by that reasonably necessary to accommodate the other;

c Provide that, until the question of who would hold title to specific areas of foreshore and seabed is resolved, the legal title be held by the Crown in trust for those later determined as entitled;

d Promote the expeditious determination of customary rights in the coastal marine area and give practical effect to them; and

e Provide transitional provisions, as necessary, to continue and advance negotiations begun under the Act.

27 The Panel proposed that the new legislation (which would follow after the interim Act) be based on a set of core principles including (amongst others):

a The principle of recognition of customary rights;

b The principle that customary rights attach to coastal hapū and iwi and not to Māori in general;

c The principle of reasonable public access;

d The principle of equal treatment;

e The principle of due process;

f The principle of good faith;

g The principle of restricting alienation;

h The principle of compensation; and

i The principle of the right to development.

28 In terms of developing new legislation, the Panel focussed on two specific models. They consider that either of which or a combination of the two would resolve the issue.

29 The first model is called the *National Policy Proposal*. It includes a number of discrete components including new legislation that provides for a 'longer conversation' with stakeholders based on the core principles (as described above). It requires the establishment of a new body to oversee the 'longer conversation' and develop the details of its framework. It would also provide a process to determine who holds customary rights in the coastal marine area.

30 The second model, called the *Regional Iwi Proposal*, focuses on achieving regional and national negotiations directly between the Crown and hapū and/or iwi. In addition, specific issues can be sent directly to the Māori Land Court for resolution.

Comment on Panel's Report

31 Overall, the Panel's report provides information, models and ideas that can assist in informing the Government's review of the Act. The Panel did not simply put forward options to restore the situation immediately following the *Ngāti Apa* decision. Rather, the Panel attempted to set out models that reconcile their view of public and Māori rights. While the preferred model requires more detail, it does contain ideas that could usefully be explored further in the development of an initial Government response. At the outset of their report, the Panel cautioned that their models were preliminary.

32 Certain aspects of the report requires further elaboration. For instance, the Panel recommends both the settlement of Māori interests in the foreshore and seabed and that no one should be denied the opportunity to have their full customary rights determined by legal process. It is not clear how these alternative processes are intended to be reconciled, especially in the period prior to effecting settlement. In addition, the Panel's view that all the coastal marine area was subject to customary title (unless an extinguishment could be proved) is difficult to reconcile with the Panel's acceptance that in some areas that title would not have amounted to full ownership because the further from the shore the less

likely Māori would have been able to prevent use by strangers. That diminishing ability to control tends to suggest that some (inner) areas of the coastal marine area may have been subject to customary title, but not necessarily areas further out to sea.

33 I am of the view that it is important that Government takes its time in responding to the Panel's report. In the next month, I will continue to carefully consider the report. In addition, further discussions are required within and across political parties represented in government and more broadly in Parliament. I am seeking a durable and comprehensive resolution to this issue that can stand the test of time.

Framing the issue

34 I am of the view that there is the need to balance the interests of all New Zealanders (including Māori) in the foreshore and seabed. These interests include:

a recreational interests in accessing, using and enjoying the coastline and marine environment;

b business interests, such as the fishing, marine farming, marine transport, mining and tourism industries, which have a significant interest in how the coastal marine area is controlled and regulated;

c local government interests, as local authorities administer much of the law that regulates use of the coastal marine area; and

d customary interests, including usage, authority and "ownership" as an expression of the reciprocal relationship between iwi/hapū and the coastal marine area.

35 There is a degree of consensus that the 2004 Act does not achieve an appropriate balance of these interests, but the reasons for that conclusion differ.

36 I consider that the 2004 Act had a disproportionate impact on Māori interests by extinguishing customary title in the foreshore and seabed and replacing potential litigation options in the Māori Land Court and High Court with new jurisdictions, new and specific tests and limited outcomes. It meant that Māori were prevented from having their territorial customary rights being determined and, where extant, being recognised to their full extent. The 2004 Act did not affect freehold title whether held by Māori or non-Māori.[1] This situation has resulted in an ongoing sense of grievance within New Zealand, particularly amongst Māori.

37 I consider that the Government has a responsibility to balance the interests of all New Zealanders in the foreshore and seabed. In

[1] As at December 2003, Land Information New Zealand identified that 12,499 privately owned parcels would (at least in part) be within the boundary of the foreshore.

undertaking this role, the Government should look to produce equitable outcomes for all interests.

Where to from here?

38 In light of the Panel's report and my own preliminary consideration of the issue, I have tentatively identified a way forward that the Government could pursue to carefully find the balance between all rights and interests in the foreshore and seabed.

39 In identifying this way forward I first considered whether the status quo, that is leave the Act in place, should be considered as a possible option for the Government's response but concluded, like the Panel, that the status quo is clearly untenable. This is primarily because the Act does not achieve a balance between all relevant rights and interests in the foreshore and seabed.

40 Secondly, I looked at an amendment to the Act but decided similarly that it cannot be considered an option because, even though the entire Act could be amended and replaced with something else, the grievances associated with the Act itself would likely remain associated with the amended Act. This view is also similar to that taken by the Panel.

41 I have therefore reached the preliminary view that a repeal of the Act has a symbolic value that will assist in resolving criticisms associated with the passage of the Act. The implications of repeal and what regime may be implemented in its place require further Cabinet consideration.

42 In terms of next steps in the development of an initial Government response to the Panel's report and the Government's wider review of the Act, I will report back to this Committee in consultation with the Minister of Māori Affairs, on 26 August with:

a the options open to the Government in its review of the Act including a preferred options;

b an outline of the proposed initial Government response to the Panel's report (in light of where it sits within the Cabinet's decisions on the Act) ; and

c a communication strategy relating to (a) and (b) to the public.

Additional matters

Negotiations

43 The Minister of Māori Affairs and I met with representatives from Te Rūnanga o Ngāti Porou on Wednesday 1 July to discuss the Ngāti Porou Deed of Agreement. It was a preliminary meeting and we agreed to meet with them again in the future to discuss next steps.

44 I will report to this Committee in consultation with the Minister of Māori Affairs, in August outlining the implications of the issues raised in paragraph 42 above for the Ngāti Porou Deed of Agreement and for each of the foreshore and seabed negotiations that have been paused.

Consultation

45 The Foreshore and Seabed Unit within the Ministry of Justice has prepared this paper. The following departments have been consulted during the development of this paper: Department of Conservation, Ministry of Fisheries, Ministry for the Environment, Te Puni Kōkiri, the Crown Law Office, Office of Treaty Settlements and The Treasury.

46 The Department of the Prime Minister and Cabinet have been informed.

Financial implications

47 There are no financial implications that arise directly from this paper.

Human rights

48 There are no human rights implications that arise directly from this paper.

Treaty of Waitangi Implications

49 There are no Treaty of Waitangi implications that arise directly from this paper.

Legislative implications

50 Any legislative implications arising out of this proposal will be addressed in future detailed policy papers.

Regulatory Impact Analysis

51 A regulatory impact statement is not required.

Publicity

52 No announcements of the decision in this paper are to be made until a more fulsome decision on the Government's response to the Panel's report, which is expected in late August 2009. Until that time, the media strategy in place will remain until a new strategy is agreed by Cabinet.

Recommendations

53 I recommend that the Committee:

BACKGROUND